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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

UNITED STATES OF AMERICA,

v.

W. M. WEBB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 218–241)[1] are not officially reported. The opinion of the court of appeals (App. A, pp. 1a–9a) is reported at 402 F. 2d 956.

JURISDICTION

The judgments of the court of appeals were entered on November 6, 1968. (App. B, p. 10a). On January 30, 1969, Mr. Justice Black extended the time for

[1] "R." refers to the printed record in court of appeals. "Supp. R." refers to the supplemental printed record in the court of appeals.

335-449—69——1

filing a petition for a writ of certiorari to and including February 19, 1969. On February 13, 1969, Mr. Justice Black further extended the time for filing a petition to and including March 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the captains and crews on fishing boats are employees of the owner for the purposes of the Federal Insurance Contributions Act, 26 U.S.C. 3121 *et seq.* and Federal Unemployment Tax Act, 26 U.S.C. 3306 *et seq.*, when they are engaged under the so-called "lay" or similar system whereby the captain has discretion in hiring and firing the crew and the captains' and crews' compensation is a share of the value of catch.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3111, 3121, 3301, and 3306 of the Internal Revenue Code of 1954 and Sections 31.3121(a)–1, 31.3121(d)–1, 31.3306(b)–1, and 31.3306(i)–1 of the Treasury Regulations on Employment Tax are printed in Appendix, *infra*, pp. 11a–17a.

STATEMENT

The fourteen respondents in these cases are engaged in the business of fishing for menhaden, an inedible fish.[2] Their business activities embrace ownership of fishing boats, fishing for the menhaden both in the Atlantic Ocean and the Gulf of Mexico through arrangements with various captains, and the disposal of the catch to fish processing plants. (R. 232.)

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[2] Menhaden fish are processed into fish meal and a fish "solubile," which is used for commercial feed. It is also processed into fish oil, which is used as a base in paints.

The term of the captains and crews varied. It was understood that the term for captains was to last an entire fishing season; it was custom and practice that it last for an entire season. Some captains fished consecutive seasons for one of the respondents. The respondents and captains induced the crews to remain with the boats for an entire fishing season by payment of a bonus at the termination of a successful fishing season. (R. 231.)

Respondent hired the captains under an arrangement which could be terminated by either party, voluntarily or involuntarily, at the conclusion of any trip (R. 224). There was no special license or papers required to become a captain. Once a captain was selected, it was only necessary for him to register as captain of a boat with the Bureau of Customs. (R. 224.)

A captain was generally selected because the respondent had confidence in his honesty and integrity, and had trust in his ability to select, organize, and supervise a crew to operate the boat and conduct successful fishing operations (R. 223). When a captain's actions aboard ship were such as to endanger life or property, respondents severed relations with them (R. 218). The captains hired and fired the crew and supervised and controlled the crew's activities at sea (R. 227, 228, 229).

The respondents gave the captains various instructions. Thus, they required that intoxicating liquors were not to be taken aboard the boats, established restricted areas which were not to be fished, and required the captain to keep the boat clean, to keep the

engines in working order, and properly to moore and to watch the boat while in port. (R. 229.) Additionally, respondents fixed the number of crewmen to be hired,[3] the pay scale of the crew (R. 228), and the general area to fished, *i.e.*, the Gulf of Mexico or Atlantic Ocean (R. 225). They designated processing plants to which the catch was to be delivered (R. 224). The boats were equipped with "ship-to-shore" radios which permitted respondents or the processing plants to remain in contact with the boats. (R. 236). Since the boats were not refrigerated, the fishing trip usually lasted only a single day. Thus, the boats were usually docked after a day's catch was transferred to the plants. (R. 234.)

A captain could be fired if he failed to follow a respondent's instructions. (R. 224.) There is no evidence of a captain ever giving instructions to any respondent; rather, the captain on occasion made suggestions on such things as the size of the crew and the scale of pay. (R. 228.) However, the captains, to the exclusion of the respondents, had full charge of the crew during the day's fishing operations. (R. 228.) The captain determined when to depart from port and when to return, where to fish (within the broad geographic area designated by respondents), and how to fish. (R. 228.)

The captains and crews were paid on the basis of the volume of fish caught, i.e., a dollar amount for

[3] The average size of a crew was 24 men. While respondents, as owners, fixed that number, the captain had a right to commence the fishing trip with a smaller crew, if he first obtained the consent of respondents. (R. 227.)

each 1,000 pounds of fish caught and delivered. The rate was set by the respondents at the beginning of each fishing season. In addition, the respondents paid the fishermen a bonus also based upon the volume of fish caught and delivered.[4] The rate of pay, including the bonus, generally remained constant throughout a fishing season (R. 229). On the basis of records kept by the captains, respondents, biweekly, issued checks payable to captains and crews in the amount computed to be due (R. 233). Respondents and the owners of the processing plants shared in the proceeds from the sale of the catch and benefited by any increase in the market price of menhaden (R. 222).

The boats were outfitted and all repairs were made and paid for by the respondents. (R. 223.) They carried and paid for all insurance on the boats. Captains and crews provided all their own clothing and food. Neither captains nor crews had any investment in the boats. The respondents paid for all the fuel used by the boats during the fishing season. (R. 232.)

If a particular trip in the season were unsuccessful (a "broker"), the captain and crew received no pay. Amounts respondents advanced to the captains for payment for such things as groceries and other provisions were ordinarily deducted from the captains'

[4] The district court erroneously found that the captains owned their catch of menhaden and sold it to respondents at the prearranged rate of pay. (R. 221, 224, 229, 233.) These findings are contrary to the evidence. The Court of Appeals appears to have corrected this error by concluding (App. A, p. 5a) that the "* * * boat owners paid the captains at an agreed price per 1,000 fish caught and delivered."

and crews' pay. However, if a trip or series of trips were "brokers," the unpaid advances were applied against subsequent trips. If expenses were at the end of a season, respondents bore the loss. (R. 232, 235–236.)

The Commissioner of Internal Revenue determined that the captains and crews were employees of respondents within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, and that respondents were liable for the employer's share of those taxes for the periods in issue. Respondents paid the taxes and commenced these refund suits in the district court. That court held that the respondents were not the employers. On the government's appeal, the Fifth Circuit affirmed (App. A).

REASONS FOR GRANTING THE WRIT

1. Conflicting approaches in the Fifth Circuit, on the one hand, and the Court of Claims, First Circuit, and the Social Security Administration, on the other, have created uncertainty and inequity in the application of the Social Security laws and the Federal Unemployment Compensation laws to those engaged in the fishing industry.

In this case, which involves menhaden fishermen in Lousiana, and in *United States* v. *Crawford Packing Co.*, 330 F. 2d 194, which involved shrimp fishermen from the Texas Gulf coast, the Fifth Circuit has sustained trial court findings that the captains and crew are not the employees of the boat owners, apparently relying on the degree of control that the captain exer-

cises over the hiring and day-to-day activities of the crew and the peculiar nature of compensation used in this industry. The Court of Claims, however, in two cases—one involving shrimp fishermen from the Texas Gulf coast and the other involving trawlermen from Massachusetts—has ruled that the captains and crew members are employees of the boat owners, and that the owners are therefore liable for the FICA and FUTA taxes. *Cape Shore Fish Co.* v. *United States,* 330 F. 2d 961; *Kirkconnell* v. *United States,* 347 F. 2d 260. The First Circuit reached the same result as the Court of Claims in *Capital Trawlers, Inc.* v. *United States,* 324 F. 2d 506, affirming per curiam, 216 F. Supp. 440 (D. Me.). The Social Security Administration also follows the latter position, which is set out in S.S.T. 387, 1940–1 Cum. Bull. 192. It, therefore, will allow benefits to any captain or crewman who applies, whether or not the boat owners who employed the applicant have paid the required taxes, since the employees are not bound by any judgment that the owner is not the employer.

There are no important factual differences among the above cited cases. Nor may any distinction be drawn between the instant case and several others that district courts in the Fifth Circuit have decided in a contrary fashion. This was confirmed by the Fifth Circuit below, which said in its opinion (Appendix A, p. 8a), "* * * courts have concluded on facts close to this case, that captains and deckhands were employees. *Jackson* v. *Phinney,* 266 F. Supp. 835 (W. D. Tex. 1967); *Kirkconnell* v. *United States,* * * *;

Cape Shore Fish Co. v. *United States,* * * *; *Capital Trawlers Inc.* v. *United States,* * * *".

In all of these cases, the salient facts were that boat owners secured captains to command the fishing vessels on the high seas, to hire and manage the crews, to manage the specific fishing operations, and to deliver the catch to specified docks whenever possible. In all cases, the captains and crews were paid a pre-arranged amount per unit of the catch returned to the docks. The captains, in these cases, exercised the same degree of control over the seafaring operations, and the owners' control over the captains was almost identical.

This system is, moreover, common to the fishing industry and finds its origins in traditional methods of hiring, controlling, and compensating seamen. See *Cape Shore Fish Co.* v. *United States, supra,* 330 F. 2d at 968–969. The only differences between the so-called "lay" system, used in the New England cases cited above, and the arrangements in this case and *Crawford Packing* are found in the degree of control the captain has over the sale of the catch. Under the lay arrangement, the catch is sold at auction; the captain has the authority to reject the bid as too low, and the captain receives the proceeds and distributes the money among the owner and the crew. In the present case, and in the other cases which have been litigated in the Fifth Circuit, the owner controls the terms of the sale, and the proceeds are paid directly to him. These differences, to the extent they bear on the result, should make the present case even more appropriate than the New England cases for the im-

position of FICA and FUTA taxes on the boat owners.

2. The court below sought to justify the different outcomes of the several cases on the ground (App. A, p. 9a) that the case does not involve "a pure question of law," and that "[u]nder the rule of *Commissioner* v. *Duberstein,* 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure." The holdings in this and the similar cases represents, however, ultimate conclusions based upon undisputed facts. No question of intent or other subjective factor is pertinent. In such a posture, the holdings represent conclusions of law which are subject to plenary review on appeal.

This is demonstrated by *United States* v. *Silk,* 331 U.S. 704, 716, and *Bartels* v. *Birmingham,* 332 U.S. 126. In *Silk,* this Court, in reviewing the question of whether coal unloaders and truck drivers were employees for Social Security purposes, treated the problem as a question of law, even rejecting (331 U.S. at 716) "the concurrence of the two lower courts in a contrary result." And in reviewing the status of members of "dance bands" for the purposes of those tax statutes, this Court again, in *Bartels,* similarly treated the issue as one fully susceptible to review by an appellate tribunal.

There are, to be sure, "mixed" questions of fact and law involved here. But the legal element is the responsibility of the courts, and it is the function of the appellate courts to guaranty the application of standards

that provide a reasonable assurance of uniformity of result in cases having fact patterns as similar as those we have discussed above. Particularly here, where the factual elements are beyond dispute, it is essential that the federal courts of appeals act as this Court did in *Silk* and *Bartels* and assume the responsibility for ultimate decision. The lines of responsibility and duties and obligations in the mutual relationships of owner, captain and crew are established and clear. The sole question is who, in this particular circumstance, is the employer, and that is without doubt a question of law. It is only the appellate courts which can decide the question in a manner that provides guidance to the federal trial courts and, just as important as a practical matter, that allows responsible government officials and private counsel to advise their respective clients in order to resolve such problems as these without the need for litigation. The Fifth Circuit, however, by its course of decision in this case and in *Crawford Packing,* has made it impossible for the liabilities for federal employment taxes of a boat owner engaged in a fishing enterprise in the Fifth Circuit to be determined until the matter is submitted to a federal judge or jury.

The error of this approach is confirmed by statements of the Congress when it amended the Social Security Act following the decisions in *Silk* and *Bartels,* for it then made clear that it expected uniformity in the application of the Act to similar situations. Prior to 1948 the statute had no definition of "employee". In that year Congress, in an amendment made retroactive to August 14, 1935, with respect to

the Social Security Act, and to February 10, 1939, with respect to the Internal Revenue Code of 1939, provided (Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438) that the term "employee" "* * * does not include (1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules."

Then, in 1950 the term "employee" was redefined as "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee." Act of Aug. 28, 1950, c. 809, Section 205(a), 64 Stat. 477, 536.

Congress made clear, however, that it did not intend to change the approach taken in *Silk* and *Bartels*. Thus it said (S. Rep. No. 1255, 80th Cong., 2d Sess., p. 7):

> In the view of your committee these decisions affirm that the usual common-law rules realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act. *And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.* [Emphasis supplied.]

Here the situation is not dissimilar from the authority often given to a foreman in an industrial plant, or to the employment office in a branch or division of a large company. The fact that the local manager, or one of his subordinates, has power to hire and

fire, and within considerable limits, to fix duties and conditions of employment does not mean that the persons hired are the manager's employees rather than those of the company—whose headquarters may, in fact, be far away. And a contrary ruling by the finder of fact cannot insulate the result from correction on appeal, if the courts are to implement the statute in accordance with the expectations that Congress expressed in 1948.

3. The Fifth Circuit's construction of the phrase "common law rules" as it appears in Section 3121(d)(2) conflicts with the manner in which the statute was applied by the Court of Claims in *Cape Shore Fish Co.* v. *United States, supra.* Application of the common law rules requires an evaluation of a variety of factors, most important of which is the degree of control that the purported employer may exercise over the purported employees. The relative discretion exercised by fishing boat captains over the hiring and firing of crews, the fishing schedules, and the shipboard activities have plainly been the most important element in the decision of the Fifth Circuit to sustain the result reached in the trial court in this case and in *Crawford Packing.*

Although it is clear that the captain does not have complete control of these matters, is restriced by metes and bounds established by the owner, and in many respects is subject to the veto of the owner, it is recognized that the captain's discretion is usually broad, at least in comparison to many land-based industries. However, most of his discretion is necessarily dictated by the nature of the activity—that

it takes place away from shore—and the owner's ability to exercise control has always been severely limited, at least until the invention of modern methods of communication. But this is true in every maritime activity. And under maritime law, this relative lack of day-to-day control has never been thought to allow the boat owner to escape the duties that the maritime employer owes his employees—as for example in providing maintenance and cure. It is well established in the maritime cases, indeed, that these obligations exist except when there is a bareboat, or demise, charter.

In our view, Congress, in using the phrase "common law rules", used those words in a generic rather than a technical sense. There is nothing in the legislative history to ascribe to Congress the anomalous intent of having maritime activities subject to standards, for social security purposes, that were developed in the context of land based enterprises and are entirely inappropriate in relation to enterprises conducted at sea. Rather, we should suppose that Congress intended that the employer-employee relationship be evaluated according to the standards that have been traditionally applied in the context of a particular industry. Were this not so, it would be impossible to conclude in the usual case that a seaman is the employee of a boat owner unless the owner happens to be on board ship throughout the voyage. Moreover, to ascribe such a view to Congress would be inconsistent with the thought expressed in Section 3306(c)(17) of the Social Security Act, 26 U.S.C. 3306(c)(17) (App. B., p. 13a), which exempts fishermen from social security coverage, except when on ships over ten tons in dis-

placement. The inference is clear that Congress was of the view that "common law rules" would be applied to ships of the greater tonnage, and this makes sense only if the phrase is construed in the manner in which we have proposed.

The Fifth Circuit, however, declined to hold that (App. A, p. 6a) "the relationship of the owners and crews be evaluated under principles of general maritime law". Yet it nevertheless remarked (ibid.):

> If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees.

In *Cape Shore Fish Co.* v. *United States, supra,* however, the Court of Claims expressly noted that the captain's control and crew's participation in the proceeds of the voyage gave no support to the owner's contention that the crew members were not employees. The court observed that under maritime law that method of hire, known for centuries as the "lay" system, was considered merely a method by which the owner paid his employees and did not identify the relationship as a partnership or joint venture. 330 F. 2d, at 968–969. The Court of Claims examined the maritime cases in detail, and relied for its conclusion on the fact that under maritime law the arrangements in that case would not have sufficed to relieve the boat

owner of the employer's traditional obligations to his seamen.

Thus the Court of Claims and the Fifth Circuit are in disagreement as to the relevance under Section 3121(d) of the maritime law characterization of such seafaring arrangements as existed in this and the similar cases. In both cases, the factors relied on by the ship owners to negate the employer-employee relationship would not have that effect under maritime law principles; thus the opposing constructions given the term "common law rules" by the two courts is central to the contrary results reached in the two forums and presents an appropriate issue for resolution by this Court.

4. By its approach, the Fifth Circuit has made it impossible to administer the Social Security and Unemployment Compensation statutes in an even-handed manner in the context of the fishing industry. This may best be shown by the cases involving shrimp fishermen in Texas; notwithstanding the complete identity of circumstances, the result depends entirely on the fortuitous factor of the judgment of the finder of fact which hears each case. Compare *United States* v. *Crawford Packing Co., supra,* with *Jackson* v. *Phinney, supra.*

Just as important, the decisions of the Court of Claims and the First Circuit show that results will differ in different parts of the nation even though the owners, their captains, and the crews are involved in virtually identical commercial undertakings.

Further, the Social Security Administration, in paying social security benefits, is faced with a most

difficult situation. It must have a consistent nationwide policy. The geographic location of an applicant or his work cannot be a basis for denying benefits. Nor can the results of cases such as this, to which only the boat owner is a party, bind the captains or crews.

Thus, the agency had to make a decision of whether to deny benefits to all fishermen or to give such benefits to the entire class. The agency has resolved this dilemma by paying the entire class of workers the benefits regardless of the geographic area in which they perform their services. As a result, some people now receive benefits free of any corresponding burden on them or on the owners of the boats on which they have worked. This, to be sure, does not impose a dangerous financial burden on the Social Security System. But it does, in relation to the hundreds of owners and fishermen involved, impose an inequity that presently may be resolved only through review by this Court.[5]

[5] In 1967, the Treasury Department proposed to Congress that the definition of the term "employee" contained in Section 3121(d) be amended to include expressly captains and crewmen of commercial fishing vessels. See the proposed Social Security Amendments of 1967, H.R. 12080, as amended by the Senate, Section 504(b)(1)(2), 90th Congress, 1st Sess. It was favorably reported out of the Senate Finance Committee. S. Rep. No. 744, 90th Cong., 1st Sess., p. 320. The bill was referred to the Conference Committee which reported that the Senate receded from its amendment. Conf. Rep. No. 1030, 90th Cong., 1st Sess., p. 74.

No reason is given for the action of the Conference Committee. All that is known is that Congress did not pass a statutory provision which would have resolved the problem in this case. But the problem still remains, and the failure of Congress to act may as well be taken as approval of the decisions of the Court of Claims and the First Circuit as expressing a conclusion to the contrary. Cf. App. A, p. 7a and nn. 5, 6.

The course of decision in the Fifth Circuit poses a similar administrative dilemma for the Internal Revenue Service. The need for a judicial resolution on a case by case basis has already produced a large amount of litigation. At the close of the calendar year 1968, 56 cases involving 223 taxpayers engaged in fishing operations were pending in the district courts of the Fifth Circuit. During that year, the government settled another 26 cases involving 128 taxpayers. These figures do not present the entire problem, for there are a large number of other individuals engaged in seafaring operations in the Fifth Circuit, and they either are not paying social security taxes or have not yet brought suit.

So long as the decision in this case stands, the government is left with no alternative except to litigate each of these cases to a finder of fact, or to settle all of them. The latter course is the only one that would result in any uniformity of application of the statute among numerous taxpayers similarly situated. Even then, the uniformity would be restricted to the Fifth Circuit, since it is clear that the government must continue to insist on the payment of these taxes by fishing boat owners outside the Fifth Circuit unless and until there is a contrary decision by this Court.

Furthermore, there is every reason to believe that the rule in this case will be extended to other businesses. An example is provided by the cases of *Marathon Seafoods, Inc.* v. *United States,* Docket No. 63–503, S.D. Fla., and *Pinellas Seafood, Inc.* v. *Tomlinson,*

Docket No. 64–449, S.D. Fla. Each case involved "shrimpheaders"—persons whose job it was, in a land based factory, to cut the heads off shrimp prior to commercial distribution. Each taxpayer operated a shrimp processing plant along Route 1 on Key Marathon in Florida. Indeed the taxpayers are situated side-by-side on the same road and there were no differences in the relationship between owners and workers. Nevertheless the finders of fact reached opposing conclusions, finding for the government in the first case and for the taxpayer in the second.

Nothing in *Silk* v. *United States, supra* and *Bartels* v. *Birmingham, supra* makes either of those cases a more appropriate subject for review in an appellate tribunal than this case. Presumably, therefore, situations such as existed in those cases are now committed to the final decision of the finder of fact within the Fifth Circuit, without appellate review of the nature that this Court in fact gave in those cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1969.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 25674

UNITED STATES OF AMERICA, APPELLANT

v.

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

(November 6, 1968)

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

HUNTER, *District Judge*: These tax refund cases involve similar questions of law and fact, and were consolidated by agreement of the parties. The sole question presented is whether fishermen (captains and crews) operating menhaden fishing boats owned by the taxpayers, were their employees for purposes of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) within the meaning of Sections 3121, et seq., and 3306, et seq., of the Internal Revenue Code of 1954; 26 U.S.C.A. § 3121 et seq., and 3306 et seq. The district court, after a full trial, entered its findings of fact and conclusions of law. It concluded that for the purposes of the two Acts the fishermen were not employees of the taxpayers. The Government appeals and raises two speci-

fications of error: First, that the district court erred in ignoring principles of general maritime law in its evaluation of the relationshp between the taxpayers and the fishermen. The second error asserted that even in the absence of the principles of general maritime law, this record establishes as a matter of law that the captains and crews were employees of the respective taxpayers.

All agree that both Acts impose taxes upon employers measured by the compensation paid to employees, and as defined by the statutes for our purposes is the same. Section 3121(d) reads in pertinent part:

> The term "employee" means—
> (1) any officer of a corporation; or
> (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or * * *[1]

and Section 3306(i) reads:

> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

The present definitions of the term "employee" have a common genesis. The Supreme Court in 1947, because of a lack of decisional uniformity in defining "em-

[1] "Succeeding subsections specifically include in the category of employees persons engaged in a number of quite irrelevant occupations such as agent or commission drivers distributing specified products, full time life insurance salesmen, certain home workers and traveling salesmen." *United States* v. *Thornson*, 282 F. 2d 157, 158, ftn. 1 (C.A.-1, 1960). Fishermen were not included in this group.

ployee" under the Social Security Act, decided the cases of *United States* v. *Silk*, 331 U.S. 704; and *Bartels* v. *Birmingham*, 332 U.S. 126, therein setting forth broad general guidelines to courts and agencies. As a consequence of these decisions, the Treasury Department proposed a new regulation defining the employer-employee relationship on the basis of an economic reality test. This proposed regulation caused considerable criticism in Congress and led to enactment in June, 1948, of J.H. Resolution 296 (62 Stat. 438) over President Truman's veto. The legislative history of this resolution makes it clear that the Congress meant to and did emphatically reject the economic reality test proposed by the Treasury Department, but did *lend* its approval of the Supreme Court decisions as they were interpreted by the Senate Committee.[2] Thereafter, amendments were enacted which redefined the term "employee." These amendments have been carried over into the Revenue Code of 1954 as heretofore quoted.[3] This common-law concept is described in the current Treasury Regulations on Employment Tax (1954) Code, Section 31.3121(d) 1(c):

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[2] "In view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an 'employee' for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act." (2 U.S.C. Cong. Serv. (1948), p. 1785.)

[3] The legislative history of the amendments was considered by this Court in *United States* v. *Crawford Packing Company*, 330 F. 2d 194, 195 (1964), and by other courts in various cases including *United States* v. *Thorson*, 282 F. 2d 157, 159 (C.A. 1st, 1960); *Ringling Bros. Barnum & Bailey Com. Shows* v. *Higgins*, 189 F. 2d 865, 869 (C.A. 2d, 1951); *Party Cab Co.* v. *United States*, 171 F. 2d 87, 89–91 (C.A. 7th, 1949); and *Hoosier Home Improvement Co.* v. *United States*, 350 F. 2d 640 (C.A. 7th, 1965).

§ 31.3121(d)–1 *Who are employees.*
* * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

Against this background the record here shows that the appellee-taxpayers, owners of menhaden fishing boats contracted verbally with captains, selected by them, to catch menhaden fish. The owners relinquished control of the boats to the captains who staffed and provisioned them as they saw fit without interference from the owners. The captains agreed, without a guarantee of earnings of any kind, to make fishing trips for a season and to return the catches to a plant designated by the owners. The boat owners paid the captains an agreed price for each 1,000 fish caught and delivered. In addition to the price paid per 1,000 fish unit, taxpayers also paid the captains an additional amount per unit as a "bonus." Payments were made to the crew in such amounts as the crewmen and captain negotiated, based on the number of units of fish the crewmen helped to catch. The district judge concluded that the degree of control was not such as to create the relationship of employer-employee between the owners and the captains and crewmen.

The Government suggests that we promulgate a new test in this area by applying principles of General Maritime Law in the determination of whether the captains and crews were the employees of the respective taxpayers, and alternatively, argues that even in the absence of General Maritime Law principles, the record here conclusively establishes that under the traditional "common law test" included in the regulations, the captains and crews were employees of taxpayers.

Does a realistic application of common law tests require the relationship of the owners to the captains and crews be evaluated under principles of general maritime law? The "ancient solicitude of courts of Admiralty for those who labor at sea continues unchanged, despite the progress from canvas sails to diesel engines."[4] In non-tax context when courts are asked to determine whether seamen are employees of the vessel's owner, all ambiguities or doubts are resolved in favor of the seamen. Today, the law is clear that in both categories of cases—Jones Act, and maintenance and cure—the owner of the vessel is the employer unless the vessel is held under a demise charter. The arrangements here certainly did not constitute demise charters. If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees.

However, the first matter to consider in any tax case is: What are the words of the statute? The words of the statute here are clear and explicit. The determination of the relationship is to be made on the basis of common law tests. It seems questionable, at best, whether Congress, in re-affirming the use of the common law test, intended thereby to incorporate maritime law under the FICA and FUTA. Moreover, maritime law was urged as a controlling factor by the Government in *United States* v. *Crawford Packing Company* (supra). There, the proposition was extensively briefed and argued to this Court, which sustained the trial court's findings and conclusions in *Crawford,* and sub silentio rejected the government's

[4] *Hudspeth* v. *Atlantic and Gulf Stevedores, Inc.*, 266 F. Supp. 937.

maritime-oriented definition of "employee" for tax purposes. We note that in 1967 the Treasury Department unsuccessfully proposed to Congress that the definition of "employee" under 3121(d), Internal Revenue Code, be amended to include all captains and crewmen of commercial fishing boats, with the exception of fishermen who chartered boats from owners, who, in turn, had no interest in the catch.[5] Had the Treasury's proposal been accepted, it would have mooted the issue in this case. The Committee's rejection of the proposal indicates to us Congress's intention to retain the common law control test as the sole test for defining "employee" for tax purposes, whether they be maritime personnel or other types of employees.[6]

Questions of maritime law aside, the Government presses with vigor the argument that the facts here

[5] Social Security Amendments of 1967, H.R. 12080, as amended by the Senate, Section 504(b)(1)(2), 90th Congress, 1st Session. It was reported out of the Senate Finance Committee, Sen. Rept. No. 744 on November 14, 1967, 90th Cong. 1st Sess., p. 320, stating that the proposed amendment "identifies captains and crew members of fishing vessels as employees for purposes of Title II of the Social Security Act * * * irrespective of the common law status of these persons. The amendment thus makes it unnecessary to determine the status of these persons under the common law rules applicable to an employer-employee relationship."

[6] The bill (H.R. 12080) was referred to a committee of conference, Conference Rept. No. 1030, Dec. 11, 1967, 90th Cong., 1st Sess. The Report, at p. 74, disclosed that "The Senate recedes" with respect to its amendment of Section 3121(d), Internal Revenue Code. It is interesting to note that H.R. 12080, as passed by the House of Representatives, proposed various amendments to sections of the Internal Revenue Code, but no attempt was made by the House of Representatives to alter the definition of "employee" in Section 3121(d), nor was the status of fishermen mentioned. House Rept. No. 544, August 7, 1967, 90th Cong., 1st Sess. p. 144.

are such as to preclude the decision of the district court. The district court delineated with some elaboration the relationship between the owners and the captains and crewmen. We refer to the findings of that court which makes it unnecessary for us to state the facts in detail. *Webb, Inc., et al* v. *United States,* 271 F. Supp. 249. Here, as in *Crawford,* there is no difficulty in stating that the question of status is to be determined under common law rules. This case is difficult, as have been others like it of recent vintage. The following decisions in this circuit, on facts substantially similar to those in this case, have concluded that the workers and captains were not employees within the meaning of the two acts: *Crawford Packing Company* v. *United States,* 228 F. Supp. 549, aff'd 330 F. 2d 194 (5th Cir., 1964); *Star Fish and Oyster Company* v. *United States,* 223 F. Supp. 402 (S.D. Ala., 1963); *Williams Packing and Navigation Company* v. *Enocks,* 176 F. Supp. 168 (S.D. Miss., 1958), aff'd 291 F. 2d 402 (5th Cir., 1961), reversed on jurisdictional grounds, 307 U.S. 1; *Williams Packing Company* v. *United States,* Civil Action No. 2631 (S.D. Miss., 1964); *Sea Garden Corporation, et al* v. *United States,* No. 64–9–Cir–J (M.D. Fla., 1965); *Gulf Boats, Inc.* v. *United States,* No. 2368 (S.D. Miss., 1962). On the other hand, courts have concluded, also on facts close to this case, that the captains and deck hands were employees. *Jackson* v. *Phinney,* 266 F. Supp. 835 (W.D. Tex., 1967); *Kirkconnell* v. *United States,* 347 F. 2d. 260 (Ct. of Claims, 1965); *Cape Shore Fishing Company* v. *United States,* 330 F. 2d 961 (Ct. of Claims, 1964); *Capital Trawlers, Inc.* v. *United States,* 324 F. 2d 506 (1st Cir., 1963). The excellent briefs point to many cases, but these suffice to reveal the diversity of thinking. There is a hankering for something definite and absolute, but the jurispru-

dence teaches us that there is no perfect and unchanging formula.

The Government's argument that a pure question of law is presented here does not conform to the weight of authority. Under the rule of *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure. We find that here there is ample evidence to support the finding of the district court. It might have found otherwise on the evidence adduced, but since we cannot say that those which were made were "clearly erroneous," we accept them under the mandate of Rule 52(a), F.R.C.P. Accepting these findings, the ultimate conclusion that the captains and crewmen were not employees necessarily follows. *United States* v. *Crawford Packing Company* (5th Cir., 1964), 330 F. 2d 194. The judgments for the taxpayers are affirmed.[1]

[1] The average crew consisted of 24 men. Each captain selected his own crew and controlled them. The question of whether or not the crew members were "employees" of the captain for the purposes of Federal Insurance Contributions Act taxes and Federal Unemployment Act taxes is not before us.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

October Term, 1968

No. 25674

D.C. Docket Nos. CA 15170, 15171, 15172, 15215 and 15216

UNITED STATES OF AMERICA, APPELLANT

v.

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant, United States of America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

NOVEMBER 6, 1968.

Issued as Mandate: November 20, 1968.

APPENDIX C

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 3111. RATE OF TAX.

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1955 to 1959, both inclusive, the rate shall be 2 percent;

* * * * *

(26 U.S.C. 3111.)

SEC. 3121. DEFINITIONS.

(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(d) *Employee.*—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the

employer- employee relationship, has the status of an employee; or

* * * * *

(26 U.S.C. 3121.)

SEC. 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1961 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.1 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)) after December 31, 1938.

* * * * *

(26 U.S.C. 3301.)

SEC. 3306 [as amended by Sec. 1, Act of September 1, 1954, c. 1212, 68 Stat. 1130]. DEFINITIONS.

(a) *Employer.*—For purposes of this chapter, the term "employer" does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more.

(b) *Wages.*—For purposes of this chapter, the term "wages means all remuneration for employment, including the cash value of al remuneration paid in any medium other than cash; * * *

* * * * *

(c) *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939

under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

* * * * *

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a

corporation) who is not an employee under such common law rules.

* * * * *

(26 U.S.C. 1964 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(a)–1 WAGES.

* * * * *

(b) The term "wages" means all remuneration for employment unless specifically excepted under section 3121 (a) (see §§ 31.3121 (a) (1)–1 to 31.3121 (a) (10)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages if paid as compensation for employment.

(d) Generally the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually. See, however, § 31.3121 (a) (8)–1 which relates to the treatment of cash remuneration computed on a time basis for agricultural labor.

* * * * *

(26 C.F.R. 31.3121(a)–1.)

§ 31.3121(d)–1 WHO ARE EMPLOYEES.

* * * * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to

the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * * *

(26 C.F.R. 31.3121(d)–1.)

§ 31.3306(b)–1 WAGES.

* * * * *

(d) The basis upon which the remuneration is paid is immaterial in determining

whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

* * * * *

(26 C.F.R. 31.3306(b)-1.)

§ 31.3306(i)-1 WHO ARE EMPLOYEES.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services

as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

(26 C.F.R. 31.3306(i)–1.)

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